# REVIEWS.

A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING. By Charles M. Hepburn. Cincinnati: W. H. Anderson & Co. 1899. pp. 160.

These pages form the first installment of the latest addition to the constantly increasing number of case-books intended for class instruction. The publishers announce that it is the result of the advantages derived by Mr. Hepburn, as a lecturer in the Law Department of the University of Cincinnati, by a change from the older method of instruction to the study of cases and statutes at first hand. The first part states briefly the origin and nature of code pleading, and then treats by statutes and decisions, the doctrine of the reduction of all civil actions to one form. Other parts to follow will deal with parties to actions, joinder, defences, etc. Mr. Hepburn's ability to treat the subject is assured by his clear statements of its principles in his work on the "Development of Code Pleading." The authorities are well chosen and arranged. The book promises to become somewhat elaborate and bulky, considering the small amount of time generally allotted to the study of this subject. It will form a very useful volume in schools, where it is felt that sufficient knowledge of pleading is obtained by study of the present, often varying codes, without familiarizing the student with the fundamental principles of the common-law system, affording him the accompanying advantages in analysis of facts and applications of principles. J. I. W.

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SOME RECENT CRITICISM OF GELPEKE VERSUS DUBUQUE. By Thomas Raeburn White. Philadelphia. 1899. pp. viii, 96.

Mr. White is right in thinking that few cases have given rise to more diversity of opinion than *Gelpeke* v. *Dubuque*. The law of the case is established beyond question; its justification still has a theoretical interest sufficient to excuse an addition to the literature on the subject. Mr. White has made such an addition, a real addition because of the novelty of the writer's point of view: his treatment is plausible and ingenious, and no less interesting because of its unsoundness.

The doctrine of the case is, briefly, that where a contract is entered into, which is valid under the law of the state of its making as then laid down by the courts of the state, it will be enforced by a federal court having jurisdiction of the parties, even if the state courts, having overruled their previous decisions, would hold the contract unconstitutional. In discussing this doctrine, Mr. White first demolishes various theories. The theory of Professor Thayer, developed in 4 HARVARD LAW REVIEW, 311, — justifying the rule as a rule of practice in federal courts, to protect suitors from local prejudice, — he handles roughly. In such a theory he finds no excuse for the federal courts in "foisting a law of their own construction upon a sovereign state." It may be remarked that this is an unduly strong statement of the effect of the case. The courts of the United States do not foist a law of their own construction; they adopt a construction of the state courts, though it is no longer the prevailing construction. To prevent injustice, they are not acting in a

wholly preposterous manner in refusing under all circumstances to follow the vagaries of the state courts. So much is apparent from the most cursory reading of the facts of the case in question.

Mr. White then proceeds to analyze the opinion of the majority of the court, and finds in it an unambiguous statement that the decision of the state court, overruling prior decisions and holding unconstitutional the law under which the contract was made, was a law impairing the obligation of contracts. The statement which he relies on, however, does not appear so plain as he finds it. And the different interpretation of it by Mr. Justice Miller in his dissenting opinion is not too lightly to be ignored. A member of the court who took part in the discussions of the case was in quite as good a position to know what was actually decided as is a commentator of the present day. And when the court has repeatedly held that a case of the sort under discussion, coming up on appeal from the highest court of a state, presents no federal question, one may be pardoned for hesitating before he adopts the writer's conclusion that a federal question was decided in the case now under consideration.

The supposed decision that a judgment of a state court, holding a law unconstitutional, may itself be a law impairing the obligation of contracts, Mr. White then justifies in a most ingenious manner. He shows that the power to declare legislative acts of the colonies invalid was formerly held by the king in council; that this power was legislative, and, so far as it belonged to the federal government, it was at one time intended to be intrusted to congress; and that although finally given to the courts it has always remained a legislative power. [But no inference can be drawn from the power exercised by the king in council; he had judicial as well as legislative power.] This reasoning, moreover, is based upon a total misconception of our systems of constitutional law. A court in considering the constitutionality of a legislative act does not properly assume the attitude of a revising legislative body, weighing the pros and cons, and deciding for itself upon the propriety of the act in question. The court takes a strictly judicial position, looking to all the possible motives of the legislature, and holding no law invalid which can, within the limits of the constitution, be regarded as an expression of a possible political opinion as opposed to an arbitrary whim. In so doing, the court performs not a legislative but a judicial function.

J. G. P.

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FORMS OF PLEADING. By Austin Abbott. Completed for publication after his decease by Carlos C. Alden. Vol. II. New York: Baker, Voorhis & Co. 1899. pp. xxxix, 805 – 1858.

Twenty years and more New York has used Mr. Abbott's books as standards. One revision was not enough, nor yet a second, and last year appeared the first volume of something more then a revision, — not a collection of "General Forms of Practice," as were the others, but a work devoted to pleadings alone. Its thoroughness has caused the practitioners of New York to take considerable interest in the somewhat delayed second volume. The work, as its name indicates, consists chiefly of forms. However, few lawyers of established standing stick slavishly to such precedents, and the book is likely to prove most valuable for its authorities. At first glance the citations may seem too scant to justify this assertion. But it must be remembered that two large volumes are